Supreme Court of the United States

OCTOBER TERM, 1957

No. 57

JAMES EARL BYRD, PETITIONER,

versus

BLUE RIDGE RURAL ELECTRIC COOPERATIVE, INC., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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POINT I

Contrary to Respondent's argument in its brief, the fact that an "owner" owes a duty of due care to persons and employees of independent contractors working in the vicinity of dangerous instrumentalities owned and controlled by the "owner", does not permit the "owner" to invoke the provisions of the Workmen's Compensation Act to absolve himself from his common-law liability for negligence.

Respondent, at page 20 of its brief, takes and relies strongly upon the position that "if petitioner established by his proof that his injury resulted from respondent's negligence in carrying on his construction, he necessarily established by such proof that his remedy was under the South Carolina Workmen's Compensation Law, not the common law."

This argument is clearly untenable because the petitioner's action herein for negligence was based upon respondent's duty to exercise due care in the operation and maintenance of its own power lines to prevent electricity from running into such lines at places where it is dangerous to escape, and not, as respondent states, for "respondent's negligence in carrying on his construction."

Petitioner's theory and proof of negligence was that respondent's employee knew or should have known that electricity which it caused and permitted to run through its own lines was escaping therefrom causing the current to run into a line leading into the substation where to the knowledge of respondent it was dangerous to have current, resulting in the loss of petitioner's forearms. This theory was in accord with the South Carolina law as well as the general law. *Hill v. Carolina Power & Light Co.*, 204 S. C. 83, 28 S. E. (2d) 545; *Weeks v. Carolina Power & Light Co.*, 156 S. C. 158, 153 S. E. 119; *Hayes v. Southern Power Co.*, 95 S. C. 230, 78 S. E. 956; *Mitchell v. Light & Power Co.*, 45 S. C. 146, 22 S. E. 767; *Smith v. Appalachian Electric Power Co.* (C. A. 4), 74 F. (2d) 647; *Conowingo Power Co. v. State of Maryland* (C. A. 4), 120 F. 870.

To follow repsondent's argument that merely because of its duty of exercising due care to those in the vicinity of its existing lines, the work of the independent contractor thus becomes part of respondent's business would establish a precedent relieving and absolving owners from liability for tort to employees of independent contractors under all

circumstances and would never permit a common-law recovery for negligence against such wrongdoers. Respondent's argument, if tenable, would extend the liability of owners under the pertinent provision of the Act far beyond the meaning of the plain wording of the statute. As expressed in *Sears, Roebuck v. Wallace* (C. A. 4), 172 F. (2d) 802, 810, but not applied by the Court below in the instant case, the "statute was not intended to relieve employers from liability for their own negligence which causes injury to the employees of independent contractors engaged in work outside the scope of the latter's occupation."

We therefore submit that respondent's argument on this point is wholly without merit.

POINT II

Contrary to the contention of Respondent under its newly advanced theory that the substation at the time of Petitioner's injuries was an integral part of the commercial function of Respondent's business, there is no evidence of record to support this theory.

Respondent contends, in its brief at pages 42-43, that "the facilities, when completed, became an essential and integral part of its operating system and that accordingly, when Petitioner sustained his injuries, he was engaged in work which was essential and entered directly into and became a part of the business of the person for whom the work was being done."

Petitioner submits that this contention is clearly untenable. It is undisputed that at the time of petitioner's injuries the substation was not completed as appears from respondent's statement at pages 42 and 43 of its brief that "the facilities, **when completed, became** an essential and integral part of its business." And it is also implicit from the foregoing statement that the substation, at the time

of petitioner's injuries, prior to completion, was not and could not have been an essential and integral part of its operating system.

And apart from the foregoing, it is submitted that there is no evidentiary support in the record for respondent's newly advanced contention.

Respondent produced no evidence by expert or lay witnesses, or otherwise, to show how or in what manner a substation, during its process of construction and prior to its completion and delivery over to respondent upon payment by it of the contract price, was or could have been an integral part of respondent's operating system. In fact, evidence was not even produced showing how or in what manner a completed substation functions as an integral part of respondent's operating system. The commercial function of respondent's business is the sale of electricity and nowhere in the record could any evidence be found that the work of constructing a substation "enters directly into the successful performance of the commercial function" of respondent in supplying and distributing electric power.

On this point the Court, in the leading case of *King v. Palmer*, 129 Conn. 636, 640, 641, 30 A. (2d) 549, 552, stated and illustrated the controlling principles as follows:

> "* * * We have regarded, however, the broad policy of the Workmen's Compensation Act: *Bellow v. Notkins*, 101 Conn. 34, 37, 124 A. 831; *Massolini v. Driscoll*, 114 Conn. 546, 553, 159 A. 480; and in effect have held that the words 'process in the trade or business' included all those operations which entered directly into the successful performance of the commercial function of the principal employer. In this class of cases fall the washing of the windows of a factory; *Fox v. Fafnir Bearing Company*, 107 Conn. 189, 193, 139 A. 778, 58 A. L. R. 861; the placing of the calks in the shoes of horses by a driver engaged in collecting ashes for a city which had contracted out the performance of that func-

tion; *Massolini v. Driscoll, supra;* and the removal of rubbish in connection with the operation of a store; *Hoard v. Sears, Roebuck & Company, Inc.*, 122 Conn. 185, 189, 188 A. 269. On the other hand, where the work in which the employees is engaged does not directly enter into the performance of the commercial function of the claimed principal employer **but only affords facilities for the conduct of his trade or business,** we have held that the work is not a 'process' in that trade or business. This is so as regards the construction of a factory building; *Bogoratt v. Pratt & Whitney Aircraft Co.*, 114 Conn. 126, 436, 157 A. 860; and the construction of a partition in a factory." * * * (Emphasis added.)

And in *Glidden Rural Electric Cooperative v. Iowa Employment Security Commission* (Iowa), 20 N. W. (2d) 435 where the same question was before the Iowa Court, in rejecting the contention that the work of constructing the cooperative's primary and secondary lines being performed by the independent contractor was part of the usual business of the electric cooperative, it was stated:

"To accept appellee's view of the matter, we would have to hold that the term 'usual' business of appellant meant all things done by appellee in the preparation for the distribution of its product, electricity."

Also applicable herein is *Horrell v. Gulf and Valley Oil Co., Inc.*, 15 La. App. 603, 131 So. 709, a case factually similar to the instant case, wherein death resulted to an employee of an independent contractor engaged to construct a furnace in defendant's oil refinery. In discussing the identical question presented herein, the Court stated:

"It is no part of the trade, business or occupation of the manufacturing concern to erect its factory buildings. **Its business is to operate it after its erection** * * * (Emphasis added.)

"If the principal may contract with the independent contractor for original construction (without lia-

bility to his employees under the statute), we see no reason why he may not contract for additional necessary construction or reconstruction.

"On the other hand, it is clear that, after the factory is completed and in operation, the principal may not employ an independent contractor to undertake any part of the business of operating the factory and thus escape liability in compensation to the employees actually engaged in carrying out the work undertaken by the independent contractor."

And in *Packett v. Moretown Creamery Company*, 91 Vt. 97, 99 A. 638, the Court, discussing the liability of a creamery under the Workmen's Compensation Act for the payment of compensation benefits to an employee of an independent contractor engaged to construct a building for the use of the creamery, stated in the following language:

"The true test is, did the work being done pertain to the business, trade or occupation of the creamery company, carried on by it for pecuniary gain? If so, the fact that it was being done through the medium of an independent contractor would not relieve the company from liability. The finding of the board is that the creamery company, at the time of the injury, was engaged in the creamery business. There is nothing to show that the company was engaged in the business of erecting buildings, unless such is the effect of the fact that Flynn was erecting for it a building under a contract which made him an independent contractor and not an employee. But such is not the reasonable interpretation of employment 'for the purpose of the employer's trade or business' and 'in a trade or occupation * * * for the sake of pecuniary gain.' It would be quite as reasonable to say that Flynn was engaged in the creamery business in contemplation of the act as that the creamery company was engaged in the business of erecting buildings. We might as well say that a farmer who lets a contract to build a barn or corncrib on his premises is engaged in the business of contractor and builder or that the business of the

contractor, while thus engaged, is that of farming. * * *."

In *Boseman v. Pacific Mills*, 193 S. C. 479, 8 S. E. (2d) 878, the Court held that the work of painting the inside of a mill's water tank being done by an independent contractor constituted an integral part of the mill's business of manufacturing cloth. Unlike the facts in the instant case, evidence was produced in support of the holding of the cited case that (1) the mill furnished the equipment, ladders, lumber and scaffolding necessary to do the work, and (2) that such work was essential and necessary for the fire protection and continuance of the mill's principal, usual and normal business of manufacturing cloth, without which work such operations could not, because of fire hazard, safely continue. In pointing out such requirements of proof which were absent in the present case, we quote:

> "The testimony was to the effect that the mill furnished all the paint, the ladders and any lumber or scaffolding necessary to do the work. As already seen, the contract itself contained a postscript that 'the above work is all subject to inspection and approval by representatives of Pacific Mills.' The tank was an integral part of the mill business. There was also testimony to the effect that the mill desired that the work on the inside of the tank be completed as soon as possible so that its everyday, ordinary service, that of fire protection, could be resumed, it being shown that the mill depended upon this tank for such protection. The very nature of the work done by the mill, that of the manufacture of cotton into cloth, especially required the best of protection against fire. Hence this tank was particularly necessary and essential in the operation and carrying on of the business of the mill. It, therefore, follows that the painting of the tank was such a part of the trade, business or occupation of the Pacific Mills as would constitute Martin a subcontractor, and thus render the mill liable to the beneficiary of Boseman for payment of compensation."

It should be noted that in the *Boseman case, supra*, the water tank, a completed facility in use,* was held to be an integral part of the mill's business because "it was shown that the mill depended upon" it for its operation, **and that this facility was owned and controlled by respondent and in use and operation at the time the maintenance work was performed therein,** a necessary requirement as pointed out by the South Carolina Supreme Court in *Miles v. W. Va. Pulp and Paper Co.*, 212 S. C. 424, 48 S. E. (2d) 26. And in contrast to the facts therein, here the substation, at the time of petitioner's injuries, was not an integral part of respondent's business because it was neither owned, possessed, controlled nor used by the respondent. There was no evidence of record by either lay or expert testimony, or otherwise, to show how or in what manner a substation prior to and during the process of its construction and erection was or could have been an integral part of respondent's operating system.

To reach the conclusion that work constitutes an integral part of one's business, where such work is not ordinarily and appropriately performed by his direct employees, evidence is required, that such work is performed with some degree of constancy, frequency or regularity in the "owner's" business in accordance with the requirement that the words, to wit, trade, business and occupation, "non-tech-

* In *Boseman v. Pacific Mills, supra*, in the brief of appellees (claimants) filed in the South Carolina Supreme Court, the importance and necessity of evidence of completion and use by the owner of the facility to constitute it an integral part of the owner's business was successfully stressed and pointed out. Thus, in their contention, for the application of the Act, which was upheld by the Supreme Court, claimants stated in their brief, from pages 2, 4 and 5 of which we quote, as follows: "*The tank was not in the process of being built. It was already up and an integral part of the mill.* * * *" The appellant has cited a few cases to support his contention, all of which we feel have some distinguishing features different from the case in hand. It is worthy of note that in the cases of * * * *Packett v. Moretown Creamery Co.*, * * *; all of which appellant cites at the respective pages noted in his brief, the workman was injured while working on some part of a plant or factory that had not yet been built and become an integral part of the business of the original contractor."

nical words used in the statutes are taken to have been used in their ordinary sense and acceptation", *Benbow v. Edmunds High School*, 220 S. C. 363, 371, 372, 67 S. E. (2d) 680, 683, 684, and without which work the continued operation of the owner's principal, usual and normal business would be jeopardized or cease to function. *Boseman v. Pacific Mills, supra.*

Not only is there an absence of the required evidence, but on the contrary, the opposite appears in the record. Mr. Hurt testified that the business involved herein was operated by the State of South Carolina Authority without even a single substation prior to its acquisition by respondent (R. 42) thus indicating that such business could function without the necessity of a substation. He also testified that prior to the construction of the two substations built at Walhalla and Pickens under its contract with Bouligny, the respondent had, other than the station acquired by it from the State of South Carolina Authority and which was not considered as a substation but simply as a transformer (R. 42), three other substations, to wit, the Liberty substation which was built by Sumter Builders, and the Seneca and Oakway substations (R. 40). The record does not show whether the latter two substations were acquired from the State Authority or built by independent contractors subsequent to respondent's acquisition of the business. But viewing the evidence in the light most favorable to respondent, assuming that the latter two substations had been built subsequent to acquisition by respondent of its business, it is thus apparent that, at the most, only three substations were built for respondent during its fourteen-year period of operating the business from 1939 (R. 29) to 1953 when the substations at Walhalla and Pickens were constructed by Bouligny (R. 35). And the record also fails to show whether they were built at the same time or at

occasional intervals. Such evidence, we submit, is not only totally lacking in the proof required to establish that the work of constructing substations constitutes an integral part of respondent's business, but is clearly indicative of the contrary.

Although the Court below in its prior case of *Sears, Roebuck & Company, Inc. v. Wallace*, 172 F. (2d) 802, 810, clearly expressed the controlling principles which carry out the purpose of the provision of the Act herein involved, it failed to apply these principles to the facts in this case, contrary to the applicable standard of this Court in testing the legal sufficiency of evidence. In expressing such controlling principles, the Court in the *Sears case* quoted with approval the following:

> "If the work is of such a character that it ordinarily or appropriately would be performed by the principal employer's own employees in the prosecution of its business, or as an essential part in the maintenance thereof, it is a part or process of his work.
>
> "This test carries out the chief purpose of enactments like the Virginia statute which is to 'protect the employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves of liability (for compensation) by doing through independent contractors what they would otherwise do through direct employees.' See Notes 58 A. L. R. 872, 105 A. L. R. 580. **The statute was not intended to relieve employers from liability for their own negligence which causes injury to the employees of independent contractors engaged in the performance of work for employers outside the scope of the latter's occupation.**" (Emphasis added.)

The South Carolina statute involved herein was enacted for the same purpose, that is, as expressed by the South Carolina Supreme Court in *Marchbanks v. Duke Power Company*, 190 S. C. 336, 342, 2 S. E. (2d) 825, 827:

"* * * to protect the employees of subcontractors who are not financially responsible and to prevent employers from relieving themselves from liability by doing through independent contractors what they would otherwise do **through direct employees.**" (Emphasis added.)

Contrary to respondent's contention at page 14 in its brief, its purpose was not to provide the employee "double protection"; its purpose was simply to provide the employee protection under circumstances where the direct employer is not obligated by law to provide Workmen's Compensation coverage for the employee.

In the case *sub judice*, however, it is clear from the record that petitioner's employer, Bouligny Construction Co., was financially responsible, having qualified under the Act, and that respondent did not engage Bouligny Construction Co. to do work which respondent otherwise does through its direct employees for the purpose of relieving itself from liability for payment of compensation benefits.

It is therefore submitted that, in the absence of the reason for the passage and application of the pertinent provision of the Act involved here, good logic and sound reasoning dictate that such provision of the Act is neither applicable, nor should be applicable, to the facts in the instant case.

The reason for the enactment of the pertinent provision of the Act also furnishes additional support for the decision of the Court in *Ballard v. Southern Cotton Oil Co.*, 145 F. Supp. 882, wherein it was held that if a person referred to as an "owner" secondarily liable under the Act does not come within it to bear its liability, he cannot be accorded its immunities even though the work performed by the independent contractor may be deemed part of the owner's business. In distinguishing the *Marchbanks case*, the District Judge pointed out that the Act was applicable only in

those cases where there was evidence that the independent contractor was financially irresponsible because he did not come under the Act compulsorily. In other words, it was not intended that the Act apply unless the employee's protection otherwise depended upon the mere whim of the contractor whether he would operate under the Act rather than his compulsory inclusion within the Act. This reasoning finds fortification in the recent South Carolina case of *Adams v. Davison-Paxon Company*, 230 S. C. 532, 96 S. E. (2d) 566, wherein the Court, in discussing the reason for the passage of the Act, indicated that it is intended to apply only to cases where "subcontractors" are not required by law to operate within the coverage of the Act, as follows:

> "It was pointed out that the purpose of the statute is to extend the benefits of workmen's compensation to workmen who otherwise would not be entitled to them. It is a protection of the employees of irresponsible contractors who do not provide workmen's compensation coverage for their employees, and prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees."
>
> "In the case in hand it appears that appellant and Emporium operated within the coverage of the compensation law; **but that of Emporium must have been voluntary because they had only three employees in appellant's store.** Sees 72-107 (2) and 72-109. Except for this voluntary assumption by Emporium of liability under the Act and except for the effect of Sec. 72-111, plaintiff would be without the protection of workmen's compensation." (Emphasis added.)

Thus, even assuming that work may be part of an "owners" business, to permit him to invoke the Workmen's Compensation Act to avoid his common law liability for tort to a person whose immediate employer, the independent contractor, comes within the mandatory provisions of the Act, would extend its application beyond the manifest and

expressed purpose of the Act. It would serve to protect not the employee but the "owner" to the detriment of the employee.

In the instant case, the record fails to show that the independent contractor's operation under the Act depended upon its voluntary, rather than compulsory, operation thereunder. Therefore, it is submitted that in accordance with the resuming of both the *Ballard* and *Adams cases*, the Act is not applicable to the facts herein. And in this connection, it should be noted that in all of the South Carolina cases in which the pertinent provision of the Act involved herein was held applicable the person referred to as a "subcontractor" under the Act did not come within the Act, or, if he did, his operation thereunder was voluntary rather than compulsory. Thus, in *Marchbanks v. Duke Power Company*, *supra*, the "subcontractor" had less than the number of employees he was required to have in order to compulsorily come within the Act; in *Adams v. Davison-Paxon Company*, *supra*, the "subcontractor" likewise did not employ the required number of employees to compulsorily come within the Act, although it did operate voluntarily under the Act; in *Kennerly v. Ocmulgee Lumber Company*, 206 S. C. 481, 34 S. E. (2d) 792, the "subcontractor" was engaged in logging operations which are excluded from compulsory operation under the Act; in *Hopkins v. Darlington Veneer Company*, 208 S. C. 307, 38 S. E. (2d) 4, the "subcontractor" was likewise engaged in logging operations excluded from the compulsory operation under the Act; and in *Smith v. Fulmer*, 198 S. C. 91, 15 S. E. (2d) 681, the number of employees of the "subcontractor" did not require compulsory compliance with the Act.

In connection with the foregoing cases cited by respondent in support of its position—cases in which the pertinent provision of the Act was held applicable—it should be

noted, as stated by the South Carolina Supreme Court in *Smith v. Fulmer, supra, that* "* * * there are so many different factual situations which may arise that no easily applied formula can be laid down for the determination of all cases. In other words, 'it is often a matter of extreme difficulty to decide whether the work in a given case falls within the designation of the statute. It is in each case largely a question of degree and of fact.'" And bearing this in mind, it is significant that in each of the foregoing cases there was "ownership" by the employer of the subject matter of the work which, as was so aptly expressed in *Miles v. W. Va. Pulp & Paper Company, supra,* "is in significant contrast to the facts in this case. Here there was no ownership by defendant" (respondent) of the substation prior to completion and delivery to respondent upon payment by it of the contract price. It is also interesting to note that in the South Carolina cases of *Marchbanks v. Duke Power Co., supra; Kennerly v. Ocmulgee Lumber Co., supra,* and *Hopkins v. Darlington Veneer Co., supra,* it was admitted by the pleadings and contentions of the respective parties in each of the cases that the work being performed by the contractor was part of the principal employer's business, but such cases were contested on other grounds, which likewise is in "significant contrast to the facts in this case."

Although respondent cites the recent unreported case of *Hudson v. Horry Electric Cooperative, Inc.*, we submit that instead of supporting respondent's position, it tends to support the contrary. It clearly appears from the language of that case that its defense was tried on the same theory by same counsel representing respondent that the instant case was tried in the District Court. However, as distinguished from the instant case the work involved in the cited case was the "construction of an electric power

line" and not the steel construction work of erecting a structural steel substation. And it is particularly significant that the holding in the cited case indicates that there was ample evidentiary support for the theory pursued by the defendant that its direct employees ordinarily and appropriately perform the work of constructing lines with its own facilities, and we quote therefrom as follows: *

> "The record clearly indicates that the construction of new lines * * * has been done by the Cooperative's own employees. * * * It is apparent from the record that the Cooperative owns and maintains equipment used in the construction of lines * * * and that it keeps in its workhouse materials and supplies required in the construction of new lines * * *."
>
> "According to the record, the Cooperative and its employees were then doing the same type and character of construction * * * as the work being done by Little Electric Company and its employees under the contract above referred to. According to the record, the Cooperative and its employees have constructed approximately fifty per cent of the lines * * *. Under the Little Contract, approximately 130 to 140 transformers were to be installed, whereas, the Cooperative installed with its own employees during the year 1949, approximately 600 transformers."

And as distinguished from the apparent abundance of facts adduced in the cited case to support the defendant's theory, as heretofore pointed out, in the instant case the record is barren of evidence of such facts.

It is apparent that respondent, now recognizing the lack of evidentiary support for its theory of defense adopted in the trial court, seeks to pursue in its brief a new and different theory in support of its affirmative defense. That respondent's present theory is a newly advanced one is manifest from an examination of the record.

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* Appendix to Respondent's Brief, p. 53 at pp. 55, 56.

The record shows that respondent pleaded and tried its affirmative defense in the trial court on the theory that it was in the business of supplying electricity to consumers and the work of constructing substations was part of its business because its direct employees could and do perform all the types and classes of work that was being done by the independent contractor, including the construction of substations. (Amended answer: R. a; R. 31, 33.)

And in the trial of the case in the District Court, respondent proceeded upon the theory that such defense could be established by evidence that its direct employees are qualified to and do perform all the types and classes of work that was being done by the independent contractor under its contract with respondent, including the construction of the substations involved herein. Such evidence, if established, would have been legally sufficient to create a factual issue pertaining to one of respondent's requirements of proof, in accordance with the decisions which seek to carry out the purpose for the passage of the pertinent provision of the Act involved herein. And as enunciated in *Shafer v. Southwestern Bell Tel. Co.* (Mo.), 295 S. W. (2d) 109, this theory depends upon proof that the **whole** of the work being performed by the independent contractor under its contract with the owner is work that is ordinarily and appropriately done by the direct employees of the "owner"; it is not sufficient that only part of such work is ordinarily and appropriately performed by the "owner's" direct employees.

Thus, proceeding upon this theory in the trial court, testimony was adduced from respondent's manager, A. J. Hurt, that respondent's direct employees "do all of the types and classes of work that was being done under this Bouligny contract", and that although the employees of respondent "could and did do all types of work called for

in that contract", the independent contractor Bouligny was awarded this contract "to expedite matters". (R. 33.) It was also adduced from the witness that the work performed by the direct employees of respondent included the work of constructing three substations. (R. 31.)

This was the evidence upon which respondent sought to establish its affirmative defense, but as pointed out in petitioner's original brief, the witness Hurt changed, corrected, recanted and repudiated this testimony by stating that respondent's direct employees did not construct any of its substations (R. 41, 42, 76, 77) and by making the following admission—that he was "in error in your testimony on direct examination when you said that the regular employees of the Blue Ridge REA are qualified to do all types and classes of work that Bouligny Construction Co. does"; thus destroying all of its probative value in accordance with the standard applied by this Court in testing the legal sufficiency of evidence, and consequently leaving the record with no evidence to support respondent's theory of defense pursued in the trial court.

Respondent now seeks to evade the impact of Hurt's changed testimony given on cross examination, by its contention that respondent had nine substations in all and thus the six substations which Hurt stated on cross examination were not built by respondent's direct employees did not include the three substations referred to by Hurt on his prior examination as being built by the direct employees of respondent because, as respondent states at page 29 of its brief, all three of the latter substations "had either been rebuilt or had been abandoned at the time of the trial". It is submitted that this contention cannot be justified under any view of the evidence. It not only lacks evidentiary support, but the record shows conclusively to the contrary.

The record shows that on cross examination, Hurt was given the opportunity to expressly state that respondent had nine substations in all, if such was the fact, but instead of so stating, Hurt, when questioned about this, stated to counsel for petitioner that he, petitioner's counsel, was mistaken in his apparent assumption that respondent had nine substations because, as Hurt explained, some but not all of the six substations in operation had been built by independent contractors under contracts let out by respondent (R. 39), thus at that time still adhering to his testimony that three of the six substations had been built by respondent's direct employees. It should be noted that the foregoing testimony was given by Hurt prior to his cross examination when, confronted with undisputed evidence to contradict this testimony, he finally admitted that none of its six substations had been built by respondent's direct employees. Respondent's contention is further repudiated by examination of the colloquy between the District Judge and counsel for respondent as appears from the record wherein, when the District Judge stated to counsel for respondent that "according to your own testimony, you say they only built three and that is half of them", counsel for respondent took no exception to this remark and observation of the Court, but admitted that respondent had six substations, with the only qualifying remark that "one of those three has been subsequently replaced." (R. 51.)

Thus it is apparent that there is no substantial evidence of record to support respondent's affirmative defense under its theory advanced in the trial court; and in view of the facts herein and in accordance with the pertinent provision of the Act involved, the purpose for which it was enacted, and both the federal and state law applicable, it is respectfully submitted that the present theory advanced by respondent is clearly untenable.

POINT III

Contrary to the contention of Respondent, assuming that the evidence presented by Respondent in support of its affirmative defense was legally sufficient, the factual issue of the weight of the evidence and the credibility of witnesses, although not the subject of jury trial in cases before the State Industrial Commission, nevertheless requires a jury determination when brought and tried in the Federal Court.

The position of petitioner herein is that the evidence was legally insufficient to support respondent's affirmative defense and thus as a matter of law the trial judge was under a duty to dismiss the affirmative defense. However, even assuming that the evidence adduced from respondent's witnesses was legally sufficient, it is clear that under the decisions of this Court, *Quock Ting v. U. S.*, 140 U. S. 417; *Sartor v. Arkansas Natural Gas Corp.*, 321 U. S. 620, a factual question was presented notwithstanding the absence of controverting evidence by other witnesses.

Respondent contends, at page 41 of its brief, that notwithstanding petitioner's position that a factual question was created, it is for the Court and not the jury to "resolve the conflicts in the evidence" and determine the facts, and cities in support of this contention the South Carolina case of *Adams v. Darison-Paron Co.*, 230 S. C. 532, 96 S. E. (2d) 566.

In this connection, it may be noted that according to the State practice governing cases brought before the State Industrial Commission, the South Carolina Supreme Court is not bound by the findings of fact of either the trial tribunal or the lower reviewing Court, even though such findings have evidentiary support. *Miles v. W. Va. Pulp & Paper Co.*, 242 S. C. 424, 426, 427, 48 S. E. (2d) 26, 27. Therefore, of course if the state procedural law governing

cases brought before the Industrial Commission be applicable herein, this Court, likewise, would not be bound by the factual findings of the Court below and be free to, and should, reach an opposite factual finding than found by the Court below.

However, since this action was brought in the federal court and sounds in tort at common law the procedural question of whether factual issues are triable by jury is controlled, not by the state practice, but by the practice in the federal courts which in the interest of the orderly and uniform administration of justice is governed by the Federal Rules of Civil Procedure and the Seventh Amendment to the United States Constitution. *Herron v. Southern Pacific Co.*, 283 U. S. 91; *Ettelson v. Metropolitan Life Ins. Co.* (C. A. 3), 137 F. (2d) 62; 5 Moore's Federal Practice, Section 38.08 (6).

It is therefore submitted that, assuming *arguendo*, the evidence produced by respondent was legally sufficient to support its defense, in accordance with the applicable decisions, there was created a factual issue determinable by a jury; and, in any event, whether such issue be determinable by the court or jury, it could not be resolved against petitioner under the circumstances of this case without violating his right to be heard under the "due process" clause of the United States Constitution.

POINT IV

Contrary to the contention of Respondent, even assuming, arguendo, that Respondent's evidence was legally sufficient, regardless of whether it created a factual issue determinable either by a court or jury, it is clear that the action of the court below in directing entry of judgment for respondent deprived Petitioner of his day in court and right to be heard, in violation of the "due process" clause of the

Fifth Amendment to the United States Constitution and was contrary to the applicable decisions of this court.

Respondent, at page 49 of its brief, contends, "There is no question that petitioner had full opportunity and occasion in the District Court to offer reply testimony to the respondent's case on this or any other issue", and relies for its contention upon the statement of petitioner's counsel to the Court "that he did not know of any reply that was necessary when directly asked by the Court if he would offer any testimony". The short answer to this contention is that the District Court agreed with the statement of petitioner's counsel as is manifest from the District Court's action in dismissing the affirmative defense. It is thus obvious that there was no occasion nor necessity at the trial of the case to present evidence on an issue which had been withdrawn by the Court from the case.

Respondent also relies for its contention upon the fact that petitioner "remained silent when the Court expressly allowed respondent to reserve its rights and to include this same defense in its grounds for a directed verdict." It is clear, however, that this express allowance by the District Court was made after the issue of the affirmative defense had been withdrawn from the case and during respondent's argument on its motion for a directed verdict. The record also shows that upon completion of respondent's argument the motion was promptly denied by the Court. Under such circumstances, it is clear that petitioner acted with propriety in accordance with orderly trial procedure in not interrupting respondent's argument on its motion; and in view of the Court's prompt denial of such motion, we submit it is also obvious that any objection by petitioner to a ruling in his favor would have been entirely out of order.

Respondent, at page 50 of its brief, also contends that petitioner's position in moving for a dismissal of the affir-

mative defense in the trial court is inconsistent with his present position that he is entitled to a jury trial.

When we consider that both the motion of petitioner for an involuntary dismissal of respondent's affirmative defense made at the close of respondent's evidence but prior to petitioner's case in reply and the motion of respondent for an involuntary dismissal of petitioner's case made at the close of petitioner's case but prior to respondent's case in defense did not contemplate a waiver by either party to present controverting testimony and have a jury trial in the event of denial of such motions, it becomes manifest that there is no inconsistency between petitioner's present position and that asserted by him at the trial.

It is thus clear that even assuming, *arguendo*, that respondent's evidence was legally sufficient, regardless of whether the only conclusion that could be drawn therefrom was in favor of respondent's affirmative defense, or, on the other hand, it created a factual issue determinable either by a court or jury, the action of the Court below violated petitioner's rights under the "due process" clause of the Fifth Amendment to have his day in court and be heard, and was contrary to the applicable decisions of this Court. *Weade v. Dickman, Wright & Pugh*, 337 U. S. 801; *Fountain v. Wilson*, 336 U. S. 681; *Kaku Nagano v. McGrath*, 342 U. S. 916.

Petitioner submits, however, that the constitutional issues of petitioner's right under the "due process" clause and his right to a jury trial under the Seventh Amendment need not be reached by this Court if it holds that, as petitioner contends, there is want of substantial evidence of record to support respondent's affirmative defense. And even if this Court should hold that respondent's evidence is legally sufficient to create a factual issue, the foregoing constitutional questions would likewise be rendered academic if in so holding this Court also holds that the pro-

cedural state law governing cases brought before the Industrial Commission is applicable and in applying same resolves the factual issue contrary to the findings of the Court below.

Succinctly stated, in accordance with applicable principles of law, the judgment of the District Court should be affirmed and reinstated in the event this Court (1) should conclude that respondent's evidence was legally insufficient or (2) should hold that a factual issue was created by respondent's evidence, but in so holding applies the state practice which respondent contends is applicable and reaches a finding of fact contrary to that of the Court below. In the event, however, that this Court should reach the constitutional issues presented herein, the case should be remanded for a new trial as otherwise petitioner's right to be heard under the "due process" clause of the Fifth Amendment and his right to a jury trial under the Seventh Amendment would be clearly violated.

CONCLUSION

For the foregoing reasons and for the reasons stated in petitioner's brief, it is respectfully submitted that the judgment of the Court below reversing and remanding the judgment of the District Court with direction to enter judgment for respondent be reversed and that the judgment of the District Court should be affirmed.

Respectfully submitted,

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